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No. 933

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

LUTHER M. NISBET,
Petitioner

vs.

THE STATE OF TEXAS,
Respondent

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILL WILSON
Attorney General of Texas

RILEY EUGENE FLETCHER
Assistant Attorney General

LEON F. PESEK
Assistant Attorney General
Capitol Station
Austin 11, Texas
Attorneys for Respondent,
The State of Texas

Baldwin Printing Company, Inc., 209 West 8th Street, Austin, Texas

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

OPINIONS BELOW

The Opinon of the Court of Criminal Appeals of Texas is not yet reported. It appears as Appendix "A", at page 7 of the Petition for Writ of Ceritorari.

JURISDICTION

The Petitioner has exhausted all of his remedies in the state courts of Texas. It is questioned by the

Respondent that any substantial federal question is presented for adjudication by the Supreme Court of the United States.

QUESTION PRESENTED

Will the Supreme Court of the United States review the interpretation and application of a state procedural rule by the highest court of the State of Texas having criminal jurisdiction, and make its own determination of the interpretation and application of said rule?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourteenth Amendment, Section 1, which reads in part as follows:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT

Respondent denies each and every allegation of fact stated by Petitioner in his Petition, except those facts supported by the record, and those facts specially admitted by the Respondent.

This is a criminal case in which the Petitioner was charged by indictment with the felony offense of conspiracy to commit a felony. The case was tried before a jury in the Criminal District Court No. 3 of Harris County, Texas, resulting in Petitioner's conviction. Motion for new trial was overruled by the trial court, and the Petitioner appealed to the

Court of Criminal Appeals of Texas, which is the highest court having criminal jurisdiction in the state. The Court of Criminal Appeals of Texas delivered its opinion affirming the judgment of the trial court on December 16, 1959. Petitioner filed Motion for Rehearing, which was overruled by the Court of Criminal Appeals without written opinion on February 17, 1960.

Respondent urges that there is no substantial federal question presented for determination by the Supreme Court of the United States. Petitioner is an attorney at law. (Appellant's Brief, Page 39, filed in the Court of Criminal Appeals, and signed by Petitioner as attorney for himself). Appellant was represented in the trial of this case by two attorney, Mr. Thomas M. Ryan and Mr. Jo Ed Winfree, Statement of Facts, Vol. 1, page 1, Appearances).

In the opinion of the Court of Criminal Appeals of Texas, at pages 11 and 12 of the Petition, is found the following:

> "Appellant complains that the trial judge fused to order the district attorney to produce the grand jury testimony of the accomplice witness Joe Mitchell Sam, and declined to permit him to prove by the district attorney that he had such a statement.
>
> ". . .
>
> "On cross-examination Sam was asked whether or not he had told the grand jury that such checks were payments for appraisal work Joe L. Angle, Jr., had done for Sam Realty Com-

pany and were in no wise connected with the acquisition by the City of Houston of properties of his father's estate.

"The witness answered that he did not remember that testimony, and did not recall w at was said.

"The complaint as to the court's ruling was not pursued after verdict. All that appears happened in the jury's presence. There is nothing in the record to show that the witness' testimony before the grand jury was in fact reduced to writing, and nothing to show that the witness' testimony before the grand jury was at variance with his testimony at the trial.

"Under the record we hold, consistent with the prior holdings of this Court, that the trial judge did not err in these rulings." (Emphasis added)

All that transpired in the trial court with reference to the point now relied upon by Petitioner before this Court is found in the Statement of Facts, pages 284 to 288, inclusive. This occurred in the presence of the jury. No effort was made to retire the jury in order to develop the point. There is no record showing that Petitioner developed the point at his hearing on Motion for New Trial after the verdict. As a result, there is no showing that any written record of testimony before the grand jury exists.

ARGUMENT

The case of *Jencks v. United States*, 353 U. S 657, relied on by Petitioner, is a Federal rule of procedure, applicable to trials in Federal Courts. The

rule is now incorporated in the Federal statutes as Section 3500, Title 18, United States Code Annotated. But, even in a Federal case, the *Jencks* case is not applicable. In *Pittsburgh Plate Glass Co. v. United States*, 360 U. S. 395, it is stated on page 398:

> "It appears to us clear that *Jencks v. United States*, supra, is in no wise controlling here. It had nothing to do with grand jury proceedings and its language was not intended to encompass grand jury minutes. Likewise, it is equally clear that Congress intended to exclude those minutes from the operation of the so-called Jencks Act, 71 Stat. 595, 18 U.S.C. (Supp. V, 1958), Sec. 3500."

See also *United States v. Procter & Gamble*, 356 U. S. 677.

Had there been any showing of the existence of such a written transcript of the testimony before the grand jury, the ruling of the Court of Criminal Appeals of Texas on the right of disclosure of such testimony would still be final on such a question of procedure in a Texas Court. *Hebert et al v. Louisiana*, 272 U. S. 312, 316; *Francis v. Resweber*, 329 U. S. 459, 461-462.

CONCLUSION

We respectfully submit, therefore, that the Petitioner does not submit a substantial federal question, and for the foregoing reasons it is respectfully

submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

WILL WILSON
Attorney General of Texas

RILEY EUGENE FLETCHER
Assistant Attorney General

LEON F. PESEK
Assistant Attorney General
Capitol Station
Austin 11, Texas

Attorneys for Respondent,
The State of Texas

Service

I, Leon F. Pesek, Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and I do now enter my appearance in the Supreme Court of the United States in the above captioned cause, in behalf of the Respondent; I do further certify that a copy of the foregoing Brief has been forwarded by United States Mail, First Class, Postage Prepaid, to each of Petitioner's attorneys, Mr. Luther E. Jones, Jr., 338 Laurel Drive, Corpus Christi, Texas, and Mr. Percy Foreman, 1116 Capitol Avenue, Houston, Texas.

Leon F. Pesek
Assistant Attorney General of Texas